

Decision **PROPOSED DECISION OF CALJ SULLIVAN** (Mailed 11/4/2014)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of San Diego Gas & Electric Company (U902E) for Approval of its Proposals for Dynamic Pricing and Recovery of Incremental Expenditures Required for Implementation.

Application 10-07-009
(Filed July 6, 2010)

**DECISION DENYING MOTION TO ACCEPT APPLICATION FOR
REHEARING OF DECISION 12-12-004****Summary**

This decision denies San Diego Gas & Electric Company's Motion to Accept the Application for Rehearing of Decision 12-12-004 as Timely Filed or, in the Alternative, for Leave to Late-File Application.

1. Background

On December 27, 2012, the Commission issued Decision (D.) 12-12-004, resolving San Diego Gas & Electric Company's (SDG&E) Application for approval of its dynamic pricing proposals and closing the proceeding.

Rule 16.1 of our Rules of Practice and Procedures¹ requires, in this case, that an application for rehearing be filed within 30 days after the date we mail our order or decision. Because D.12-12-004 was issued on December 27, 2012, and 30 days from issuance is Saturday, January 26, 2013, when the Commission

offices are closed, under Rule 1.15 the time limit is extended to Monday, January 28, 2013. Under Rule 1.15, an act that occurs after 5:00 p.m. is deemed to have been performed on the next day. Thus, our rules and regulations required an application for rehearing of D.12-12-004 to be filed with our Docket Office by 5:00 p.m. on January 28, 2013.

According to SDG&E, on January 28, 2013, its staff ran into technical difficulties in processing its application for rehearing of D.12-12-004. SDG&E explains that these technical difficulties were the result of an operating system and Adobe software upgrade. SDG&E states that according to its records, on January 28, 2013, it began the electronic filing process for its rehearing application five minutes before the Commission's deadline at 4:55 p.m. and began to send data to the Commission at 4:58 p.m.

According to our electronic filing records, our Docket Office did not receive SDG&E's application for rehearing until after 5:00 p.m. on January 28, 2013, after the end of our business day. Because the document was received after 5:00 p.m., our Docket Office recorded it as received on Tuesday, January 29, 2013 at 8:00.01 a.m. (*See* Rule 1.15.) The Docket Office subsequently rejected SDG&E's application for rehearing as untimely.

We do not usually accept motions for filing in closed proceedings, other than as may be related to an application for rehearing, request for intervenor compensation, or petition for modification, all of which reopen the proceeding for their respective limited purposes. However, we deviate from that protocol here because justice requires that we allow SDG&E an opportunity to obtain a

¹ Subsequent rule references are to the Commission's Rules of Practice and Procedure, unless otherwise noted.

Commission decision regarding its ability to file its application for rehearing. (See Rule 1.2.) Accordingly, SDG&E tendered and we accepted for filing on February 15, 2013, SDG&E's motion to accept its application for rehearing as timely filed or, in the alternative, for leave to late-file it.

2. Discussion

2.1. SDG&E's Application for Rehearing Was Not Timely Filed

SDG&E argues that the Commission's Docket Office was wrong when it rejected SDG&E's application for rehearing as not timely and informed SDG&E that the Commission's rehearing deadline was jurisdictional by statute and that the Commission has no authority to waive the requirements.

Pursuant to Rule 16.1 of our Rules of Practice and Procedure, applications for rehearing must be filed within 30 days of the date the decision was mailed. Rule 16.1 is based on Public Utilities Code Section 1731 which requires that parties file for rehearing within 30 days of the mail date to have standing to challenge a Commission decision by filing a petition for writ of review. In pertinent part, Section 1731(b)(1) states:

After any order or decision has been made by the commission, any party to the action or proceeding . . . may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance. . .

We have previously addressed the issue as to whether we have discretion to accept late-filed applications for rehearing in D.05-01-060. In that case, the

Docket Office received, via first class mail, a party's application for rehearing one day after the deadline. We determined that due to the statutory deadline in Section 1731 which affects the finality of decisions, we lack discretion to accept late-filed applications for rehearing. In D.05-01-060 we stated:

While it can be argued that Section 1731 appears to only prohibit parties from filing for court review if they miss the 30-day deadline for filing applications for rehearing, Section 1708 must be considered as well. Once the 30 days for filing an application for rehearing has expired, the Commission's decision is final. At that point, we cannot rescind, alter, or amend any decision without providing notice and the opportunity to be heard. In contrast, under

Section 1736, the filing of a timely application for rehearing allows us to abrogate, change, or modify our decision without additional notice and opportunity to be heard provided to parties, beyond that provided by the application for rehearing and the opportunity to respond to it. Accepting a late-filed application for rehearing and then subsequently, in an order on rehearing, abrogating, changing or modifying the decision without providing the requisite notice and opportunity to be heard as in the case of complaints, would violate Section 1708. (D.05-01-060 at 4 (slip op).)

We therefore determined that once the 30 days had run our order is final, and we are without discretion to accept an untimely application for rehearing. (D.05-01-060 at 4 (slip op).)² Thus, we do not have the discretion to accept SDG&E's application as a late-filed rehearing after January 28, 2013.

This case, however, is slightly different from D.05-01-060 because SDG&E attempted to file its application on the day it was due, but missed our 5:00 p.m. deadline. Thus, we must consider whether we have the discretion to accept an

² In D.05-01-060 we overruled D.90105 to the extent it was inconsistent with this determination.

application for rehearing tendered for filing after our 5:00 p.m. deadline but before 11:59 p.m. on the 30th day.

This issue is relatively new and arises because we now have an electronic filing system. Prior to the implementation of our electronic filing system, documents could only be filed by mail or in person and our deadline was the close of business at 5:00 p.m. as after that time our office was closed.³ We did not have a specific rule establishing the 5:00 p.m. because it was not necessary. When we created our electronic filing system our Docket Office continued to implement a 5:00 p.m. filing deadline for electronic filings. (*See California Public Utilities Commission Electronic Filing System User Guide* dated October 2009, at 1.)

In 2010, we sought comments on proposed amendments to our Rules of Practice and Procedure, some of which dealt with electronic filing and service related issues. On March 2, 2011, we issued Resolution ALJ-260 which approved several Rule amendments to provide greater clarity and to streamline certain procedures. (Resolution ALJ-260 at 1.) Specifically, we amended Rule 1.15 to clarify that an act must occur by 5:00 p.m. to be deemed to have been performed on that day. (Resolution ALJ-260 at 3.) In adopting this rule, we specifically considered parties comments and objections. No party specifically argued that we should extend the 5:00 p.m. deadline for filings. While one party argued that having a 5:00 p.m. service deadline would undercut one of the benefits of

³ Unless otherwise provided by law, all offices of every state agency shall be kept open for the transaction of business from 8 a.m. until 5 p.m. of each day from Monday to Friday, inclusive, other than legal holidays. However, any state agency or division, branch or office thereof may be kept open for the transaction of business on other hours and on other days than those specified in this subdivision. (Gov. Code, § 11020, subd. (a).)

conducting business electronically, we disagreed. We determined that it was necessary to establish a common understanding of the deadline by which an act must be performed. (Resolution ALJ-260 at 9.) Although we could have adopted an 11:59 p.m. deadline for electronic filings, we did not. We also did not include a specific provision in the Rule 1.15 to allow for extensions to 11:59 p.m. for good cause for filed documents.

SDG&E argues that because this 5:00 p.m. deadline is established by Commission Rules and not by statute, the Commission has the discretion to accept SDG&E's Application under Rule 1.2 which allows deviations from our own Rules. (Motion at 4, 7.) Rule 1.2 *allows* us to deviate from our rules in special cases and for good cause but it does not require us to do so. It is within our discretion to determine when deviation from our Rules is appropriate. The purpose of Rule 1.15 was to establish a defined cut-off time because we determined that it is important to establish a common understanding of the deadline by which an act must be performed. (Resolution ALJ-260 at 9.) We believe this is especially important with Applications for Rehearing and we will not allow deviations from this Rule. Without strict compliance we would be in the position of having to consider how late or what reasons amount to good cause, something that could lead to claims of unfair treatment or bias. Adopting a bright-line rule for the filing of applications for rehearing ensures orderly processes, alleviates unpredictability, and ensures all parties are treated fairly and equally.

Thus, our Docket Office was required to reject SDG&E's late-filed application tendered for filing. Counting the days of issuance to the date of filing and following our 5:00 p.m. deadline for filing is ministerial and does not involve

any unlawful delegation of the Commission's authority as there is no exercise of discretion involved.

SDG&E argues that language in Resolution ALJ-260 indicates that the Commission has the discretion to accept filing between 5:00 p.m. and midnight.⁴ (Motion at 9.) However, the discussion SDG&E cites in Resolution ALJ 260 does not concern filings with the Commission's Docket Office. The language cited indicates only that an Administrative Law Judge (ALJ) or Assigned Commissioner (AC) has the discretion to extend the service deadline through an ALJ or AC Ruling. As SDG&E is well aware, our proceedings often require parties to serve testimony or other documents on parties but these documents are not filed with our Docket Office. Thus, SDG&E's reference to language in Resolution ALJ 260 is not relevant to *filings* with our Docket Office where the Docket Office staff does not have the discretion to accept late-filed documents.

SDG&E attaches a Docket Office e-mail that it says implies that the Commission exercises discretion in other circumstances in accepting filings where time is of lesser significance. (Motion at 10.) However SD&GE does not provide any affidavit or further explanation of this e-mail. Moreover, we do not agree with SDG&E's interpretation. The attachment indicates only that on January 10, 2013, our Docket Office submitted an SDG&E document into the electronic filing system. The document was given a file date of December 14,

⁴ The language in Resolution ALJ-260 cited by SDG&E is: "[I]n instances where the difference between a service deadline of 5:00 p.m. and midnight are significant, the administrative law judge or assigned commissioner can require midnight service by ruling."

2012, because that was the date it was received by the Docket Office. The Docket Office does not have the discretion to accept late-filed documents.⁵

2.2. The Commission's Application of Rule 1.15 Was Lawful

SDG&E contends that only the court can decide if its application for rehearing was timely filed "within 30 days." (Motion at 10.) We disagree. It is the Commission's Rules that determine when the filing occurred, and thus, whether it was timely filed with the Commission.⁶ Rule 1.15 deems acts occurring after 5:00 p.m. as occurring the next day thus, under our Rules, SDG&E did not file its application for rehearing within 30 days.

The Commission has broad authority to make and interpret its own rules. While the interpretation of a regulation is a question of law subject to the court independent review, an "administrative agency's interpretation of its own regulations is entitled to consideration and respect by the courts." (*Southern California Edison Company v. Public Utilities Commission* ("Southern California Edison")) (2000) 85 Cal.App.4th 1086, 1096.) "A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored

⁵ We note that under our Rules, if a tendered document is in substantial compliance with the applicable requirements, the Docket Office may notify the party of the defect and if the document does not initiate a new proceeding, the Docket Office may consider the document filed as of the date it was tendered for filing if the defect is cured within seven days.

⁶ The California Constitution and the Public Utilities Code empower the Commission to establish its own rules and procedures. (Cal. Const., art. XII, § 2 ["Subject to statute and due process, the commission may establish its own procedures."]; Cal. Const., art. XII, § 6 ["The commission may fix rates, establish rules . . . for all public utilities subject to its jurisdiction."]; § 701 ["The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."].)

and sensitive to the practical implications of one interpretation over another.” (*Ibid.*, citing *Yamaha Corp of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 12.) Commission “decisions on procedural matters will not be disturbed absent an abuse of discretion or unreasonable interpretation of relevant statute.” (*Southern California Edison Company v. Public Utilities Commission* (Southern California Edison) (2000) 85 Cal.App.4th 1086, 1097 citing *Pacific Bell v. Public Utilities Comm.* (2000) 79 Cal.App. 4th 269, 283.)

SDG&E cites to Southern California Edison as authority for the courts to overturn a Commission decision based on an incorrect interpretation of the Commission’s own regulations. (Motion at 10-11.) However, Southern California Edison is not on point. In Southern California Edison, the Court found that the Commission’s interpretation did not follow the plain and unambiguous language of its regulation. (*Southern California Edison Company*, *supra* at 1103, 1105.) Here the plain and unambiguous language of our Rule 1.15 states that an act that occurs after 5:00 p.m. is deemed to have been performed on the next day. Establishing a strict deadline does not constitute legal error, and a court would not find otherwise.

SDG&E argues that courts have broadly interpreted rules regarding rehearings where remedial rights are at issue. (Motion at 11-12.) SDG&E cites to *California Mutual Water Companies Ass’n v. CPUC* (California Mutual) (1955) 45 Cal.2d. 152 to support its argument that the language in Section 1731 should be read to favor that its rehearing was timely filed. (Motion at 12-13.) However, California Mutual again involved ambiguous statutory language. At that time, Section 1731 stated: “No cause of action arising out of any order or decision of the commission shall accrue . . . unless the corporation or person has made, before the effective date of the order or decision, application to the commission

for a rehearing. (*Id.* at 156, emphasis added.) At that time, the Commission Rule that addressed applications for rehearing stated that, “Petitions for rehearing shall be served on all parties and should be filed before the effective date thereof. . .” thus indicating a possible permissive action. (*Id.* at 156, emphasis added.) Thus, the issue in that case was what meaning should be given to the word “made” in that statute. The Court found that construction in doubtful cases should be in favor of preserving the right. (*Id.* at 157.) The Court found that since the term “made” was ambiguous, it would apply the reasoning with reference to the rules applicable to judicial appeals and rehearings and construe the term in favor of preserving the right when substantial interest are not adversely affected by the claimed delay.

Section 1731 has since been amended and there is no longer this ambiguity. The statute now explicitly requires that the application for rehearing be filed with the Commission. Rule 16.1 also makes filing deadline mandatory. Although, SDG&E seems to argue the term “day” is ambiguous and should be subject to interpretation, we disagree. There is no ambiguity that requires interpretation. SDG&E did not file its application for rehearing with the Commission under our rules and regulations within the prescribed 30 day time.

SDG&E argues that California law encourages considering an entire day, as opposed to a fraction of a day, when the substantial rights of a party are at stake citing *Kahn v. Smith* (1943) 23 Cal.2d 12. SDG&E argues that the court could reasonably determine that a day within the meaning of Section 1731 begins and ends at midnight. (Motion at 12.) *Kahn v. Smith* is not on point as it does not involve compliance with a rule clearly setting a time of day deadline.

SDG&E argues that the circumstances here warrant statutory construction in favor of accepting SDG&E’s application as timely filed. (Motion at 13.)

SDG&E argues that it accessed the Commission's website at 4:55 p.m. and began to send data at 4:58 p.m. SDG&E argues that because it is the "California Supreme Court's policy 'to hear appeals on the merits and to avoid . . . forfeitures of substantial rights upon technicalities' and to account for an entire day where inquiries into minutes becomes material it is reasonable to assume the court would consider SDG&E's filing . . . to be timely, for purposes of determining its jurisdictions."

We disagree. SDG&E is not only an investor-owned utility subject to our regulatory oversight; it is also an experienced practitioner before the Commission. As a regulated utility and a regular practitioner before the Commission it is expected to know our Rules of Practice and Procedures. SDG&E participated in the recent amendment of the Rules which established the 5:00 p.m. deadline. SDG&E received our draft resolution that included the proposed Rule to formalize our 5:00 p.m. filing deadline. SDG&E, filed comments collectively with other practices on the draft resolution. (Resolution ALJ-260 at 8.) Thus, SDG&E is well aware that Resolution ALJ-260 adopted a Rules of Practice and Procedure which firmly established a 5:00 p.m. filing deadline. SDG&E's situation is not the result of any failure of the Commission or of our filing system.

Finally, SDG&E cites an Illinois case, *People ex rel. Madigan v. Ill. Commerce Comm'm* (*People v. ICC*) (2008) 23 Ill.2d 370 which it contends is analogous its situation. Illinois decisions are not binding on the Commission and *People v. ICC* is not on point as again it involves an ambiguity in an ICC regulations.⁷ Here

⁷ Interestingly, the Illinois Supreme Court recognized that "imposing a 5 p.m. deadline for [filing] is perfectly compatible with e-filing" and acknowledged the "extensive list of other

Footnote continued on next page

we have a specific regulation stating there is a 5 p.m. deadline for our filings. There is no ambiguity.

3. Comments on Proposed Decision

The proposed decision of the Chief Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

4. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Jessica T. Hecht is the assigned ALJ for this proceeding. Chief Administrative Law Judge Timothy Sullivan is the proponent of the proposed decision on SDG&E's instant motion. (*See* Rule 16.1(e).)

Findings of Fact

SDG&E's application for rehearing was submitted to our Docket Office after 5:00 p.m. on January 28, 2013, the deadline for filing an application for rehearing of D.12-12-004.

Conclusions of Law

1. The purpose of Rule 1.15 was to establish a defined cut-off time because it is important to establish a common understanding of the deadline by which an act must be performed.

2. Adopting a bright-line 5:00 p.m. deadline for filing an application for rehearing ensures orderly processes, alleviates unpredictability, and ensures all parties are treated fairly and equally, and thus, is reasonable and lawful.

agencies and jurisdictions that have imposed rules and regulations providing for such a

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O R D E R

IT IS ORDERED that:

1. San Diego Gas & Electric's motion to accept its application for rehearing of Decision 12-12-004 as timely filed or, in the alternative, for leave to late-file the application is denied.
2. Application 10-07-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

deadline." (*People v. ICC, supra*, at 385.)